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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 29

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL.,
Appellants,

v.

J. MILLARD TAWES, GOVERNOR, ET AL.,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF ON BEHALF OF APPELLEES

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The Daily Record Co., Baltimore 3, Md.

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OPINIONS OF THE COURT BELOW

Appellees accept Appellants' statement outlining the Opinions of the Court below.

JURISDICTION

Appellants allege that the Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. 1257(2) and 28 U.S.C. 2101 (c).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves:

(1) Section 1 of the Fourteenth Amendment to the Constitution of the United States, containing the equal protection and due process clauses, printed in Appendix A, Appellants' Brief, page 76; and

(2) Section 2 of Article III of the Maryland Constitution, printed in Appendix A, Appellants' Brief, page 76.

QUESTION PRESENTED

Does the Fourteenth Amendment to the Constitution of the United States require that the membership of the Senate of the State of Maryland "be based on, or reasonably related to, the present population" of the various political subdivisions of the State?

STATEMENT OF THE CASE

The sole question properly presented by this appeal is the validity, consistent with the Fourteenth Amendment to the Constitution of the United States, of the present apportionment plan of the State Senate of Maryland, as embodied in Article III, Section 2, of the Maryland Constitution. Appellants in the trial court conceded that, at least for the present, the somewhat recently enacted stopgap legislation regarding the composition of the Maryland House of Delegates (Chapter 1, Acts of the 1962 Special Session of the General Assembly of Maryland, also known as Article 40, Section 42, Annotated Code of Maryland, 1962 Supplement, printed in Appendix A, Appellants' Brief, page 77) satisfied the demands of the Equal Protection Clause of the Fourteenth Amendment. In the Court of Appeals of Maryland, Ap-

pellants revised their position and alternatively prayed that the General Assembly be treated as a "whole". In their Brief in this Court, Appellants allege as their second "Question Presented" the question of "total representation" as falling short of the demands of the Fourteenth Amendment.

In its Opinion of September 25, 1962, reported at 229 Md. 406, 184 A. 2d 715, printed at R. 162, 164, the court stated:

> "No question is presented as to the validity of the 'stopgap' legislation or the reapportionment of the House of Delegates."

And in his dissent to the above-quoted majority opinion, Chief Judge Brune confirmed this when he said, for the minority (R. 176):

> "It is true that the apportionment of the House is not under attack on this appeal and no question with regard thereto is now before us."

And the above is further confirmed by the language of the trial court's opinion (R. 114), where Judge Duckett states:

> "... Petitioners have conceded that the Lower House has been legally reapportioned according to population."

Consequently, it is clear that Appellants attempt here to raise obliquely what they cannot raise directly; the question of proper apportionment in the Maryland House of Delegates or of "total representation" in the General Assembly is not now before this Court.

Insofar as this appeal is concerned, the gravamen of Appellants' claim is set forth in Paragraph 22 of the Bill of Complaint (R. 8), to wit:

> "Section 1 of the Fourteenth Amendment requires that representation in the State Senate of Maryland be based on, or reasonably related to, the present population of the counties and the City of Baltimore, and that the total number of members in that body to which the counties of Anne Arundel, Baltimore, Montgomery, Prince George's and the City of Baltimore are entitled is 22, instead of the 10 Senators through whom they are now represented in that body (assuming no increase in its present membership of 29 Senators)."

Paragraph 14 of Appellees' Answer (R. 91, 92) denied the above allegations and affirmatively stated, *inter alia*, that representation in the Maryland Senate need not be based on or reasonably related to the present population of the counties and Baltimore City.

Historically and theoretically, the two houses of the Maryland General Assembly were designed to represent different segments or ideologies present in the State. The House of Delegates, according to the Constitution of 1776,[1] was comprised of four delegates from each county, plus two from Annapolis and Baltimore Town (then a part of Baltimore County). The Constitution of 1851 and each succeeding Constitution provided for membership in the House of Delegates to be based generally on a population ratio.

The Constitution of 1851[2] provided that each county should be allotted representation generally based on population, as determined by the census of 1860, subject, however, to the provision that no county should have less than two delegates.

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[1] Articles II, IV and V (Niles, *Maryland Constitutional Law*, Page 360).

[2] Article III, Sec. 3 (Niles, *Maryland Constitutional Law*, Page 406).

Similarly, the Constitution of 1864[3] apportioned the House on the basis of population, with one delegate for the first 5,000 persons, and thereafter each delegate to represent a graduated scale of the population.

The Constitution of 1867[4] originally allotted seats in the House based upon a graduated scale of population, permitting, however, each county or legislative district of Baltimore City, regardless of population, to have a minimum of two delegates.[5]

By contrast, the Senate of Maryland under the Constitution of 1776[6] was composed of 15 Senators, six from the Eastern Shore and nine from the Western Shore, chosen by an electoral college of 40 members. Each county supplied two electors and Annapolis and Baltimore Town were allotted one each.

Starting with the Constitution of 1851,[7] each county was allotted one Senator, as was Baltimore City (Baltimore City for the first time having been made a separate and independent political subdivision).

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[3] Article III, Sec. 4 (Niles, *Maryland Constitutional Law*, Page 442).

[4] Article III, Sec. 3 (Niles, *Maryland Constitutional Law*, Page 485).

[5] It is interesting to note that in Article III, Sections 3, 4 and 5 of the Constitution of 1867, prior to amendment, in establishing and providing for the members in the House of Delegates, the word "population" itself is used on at least ten occasions. This clearly indicates that the framers of the Constitution intended that the House be based upon, or reasonably related to, population. Also of interest is the fact that by Section 6 of Article III of the Constitution of 1867, before amendment, members of the House were elected for a term of two years. (This was changed by the quadrennial election amendment of Article XVII of the Maryland Constitution in 1922.) By contrast, in Article III, Section 2 of the Constitution of 1867, before amendments, the word "population" is not used.

[6] Articles XIV, XV and XVI of the Maryland Constitution (Niles, *Maryland Constitutional Law*, Pages 362, 363).

[7] Article III, Section 2 (Niles, *Maryland Constitutional Law*, Page 406).

The Constitution of 1864[8] continued to allot one Senator to each county, but also permitted one each from the three legislative districts of Baltimore City. This provision was re-adopted in the Constitution of 1867[9] and has remained in force, with the exception of Baltimore City which received an additional legislative district in 1900 and two additional legislative districts in 1922, subsequent to the annexation of portions of Baltimore County and Anne Arundel County in 1918 (Chapter 82, Laws of 1918).[10]

There seems to be some confusion regarding the status of the City of Baltimore and it is therefore deemed desirable to discuss briefly its history. Although it was chartered in 1796 (Acts of 1796, Chapter 68), it was by virtue of the provisions of the Constitution of 1851, that the City of Baltimore was recognized to be a separate, distinct and independent political subdivision of the State.[11] By virtue of the provisions of Article XI of the Constitution of 1867, Baltimore City was granted the constitutional right to maintain its own local government, subject, however, to control by the General Assembly.[13] In this respect the governmental functions of Baltimore

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[8] Article III, Section 3 (Niles, *Maryland Constitutional Law*, Page 442).

[9] Article III, Section 2 (Niles, *Maryland Constitutional Law*, Page 485).

[10] On Page 51 of the Appellants' Brief there is quoted portions of Governor Ritchie's statement relative to increased representation in the Legislature for Baltimore City. Unfortunately, the Appellants have quoted out of context and the full sentence of the statement of Governor Ritchie to the General Assembly is as follows:

> ". . . The growth of population in Baltimore *by reason of extensions of its territory and many other considerations*, entitles the city to increased representation in both houses of the General Assembly. . . .". (Emphasis supplied.)

[11] Scharf, History of Baltimore City & County (1881), pp. 62-63, Hall, History of Baltimore, Vol. 1, p. 151, *Wright v. Hammer*, 5 Md. 370; *State v. Shillinger*, 6 Md. 449; cf. *State v. Dashiell*, 6 H. & J. 268.

[13] See *Pressman v. D'Alesandro*, 211 Md. 50, 57, 125 A. 2d 35.

City were placed in a unique position comparable in the United States only to that of the City of St. Louis.

The Appellees also wish to emphasize that the use of a combination of certain counties and Baltimore City for purposes of comparison is an artificial attempt to justify the Appellants' position. It must be remembered that the said political sub-divisions, with the exception, perhaps, of Baltimore City and County, in many respects have no common economic, social or other basis for comparison. While it is conceded that each of the four counties and Baltimore City are rapidly growing urban areas, nevertheless, large portions of each of those counties are devoted to farming and other rural pursuits. Therefore, the urban-rural cleavage stressed by the Appellants exists within the very counties which the Appellants claim are adversely affected by the urban-rural conflict. Likewise, for example, the people of Baltimore City, because of its industrial concentration, do not share the problems of the tobacco farmers of Prince George's and Anne Arundel Counties or those of the dairy farmers in the northern part of Baltimore County or western part of Montgomery County. It is therefore urged that these combinations are artificial and may at times create an illusory impression.

SUMMARY OF ARGUMENT

I. *Maryland Senate apportionment does not invidiously discriminate against Appellants and others similarly situated.*

While *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, determined jurisdiction, justiciability and standing to sue, it decided those various questions and nothing more. Neither did it decide nor indicate what constitutes unconstitutional apportionment, nor whether population is the *sole* permissible basis for legislative apportionment under the equal protection clause.

Gray v. Sanders, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821, does not decide questions relating to composition of the state or federal legislatures, nor does it lay down "basic ground rules implementing *Baker v. Carr*". See Opinion of Mr. Justice Douglas, speaking for the Court, 83 S. Ct. at 807, and concurring opinion of Mr. Justice Stewart, at 809. Further, it does nothing to limit the application of *MacDougall v. Green*, 335 U.S. 281, 69 S. Ct. 1, 93 L. Ed. 3, wherein this Court spoke of not denying a state "the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses".

The ruling of the Court of Appeals of Maryland below (229 Md. 406, 184 A. 2d 715), wherein it held that historical precedent furnishes justification and constitutes a rational basis for the present apportionment of the Maryland Senate, is supported in *Caesar v. Williams*, 84 Ida. 254, 371 P. 2d 241; *Sobel v. Adams*, 208 F. Supp. 316; *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368; *Nolan v. Rhodes*, decided June 12, 1963, 218 F. Supp. 953; *Daniel v. Davis*, decided June 28, 1963, F. Supp. ; and *Jackman v. Bodine*, 78 N.J. Super. 414, 188 A. 2d 642. See also the dissenting opinions in *Sincock v. Duffy*, 215 F. Supp. 169 and *Mann v. Davis*, 213 F. Supp. 577.

Interests other than population must be taken into account in the apportionment of the Maryland Senate, where as in this case, the apportionment of the House of Delegates is not under attack, nor in question. See *Lisco v. McNichols*, 208 F. Supp. 471, recognizing as a relevant factor representation of industrial interests; *Sobel v. Adams, supra*, representation of general regional interests; *Caesar v. Williams, supra*, protection of sparsely settled areas; *Levitt v. Maynard*, 104 N.H. 243, 182 A. 2d 897, recognizing as "rational," wealth and the proposition

of total taxes paid by a district; *W.M.C.A., Inc. v. Simon, supra*, a state apportionment plan "of historic origin" and "not irrational", which "clearly gives weight to population within the state's counties which forms a basis for the ingredient of area, accessibility and character of interest", and Tyler, *Court Versus Legislature*, 27 Law and Contemporary Problems, 390, 391, 393, economic interests.

Under the Maryland plan, history and tradition may be found to be a rational exercise of state policy in connection with the apportionment here under attack. The state is to be allowed every reasonable latitude and the Maryland Constitution will not ". . . be set aside if any state of facts reasonably may be concerned to justify it . . .". *McGowan v. State of Maryland*, 366 U.S. 420, 81 S Ct. 1101, 6 L. Ed. 2d 393.

II. *The Federal Plan analogy is applicable to the Maryland Senate.*

The evolution of the Maryland Senate finds analogy and precedent in the Federal Plan, insofar as the United States Senate is concerned. Based upon compromise, as was the continued expansion of the Federal Union, Baltimore City's periodic apportionment of additional Senators, because of that city's unique position, geographically, as a great port city, industrially and otherwise, represents a rational exercise of State policy.

The allocation to each county of a single Senator, on a nonpopulation basis, is rational where, as found by the court below, the counties in Maryland "have always possessed and retained distinct individualities" (R. 166). See *W.M.C.A., Inc. v. Simon, supra*.

The counties, in relation to the states, may be compared to the states in relation to the Federal Government. Only the original 13 states may have possessed sovereignty and,

in reality, none of them possess now many, if any, true attributes of such sovereignty.

Appellèes question how a defense may be made of a federal Senate system which results in a gross dilution of individual voting power up to a ratio of 75 to 1, over twice the maximum complained of here. Is the rationale of *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884, applicable to the present apportionment of the United States Senate, under Amendment V of 'the Bill of Rights'.

The Federal analogy finds support in *Nolan v. Rhodes, supra.* And see the dissenting opinion of Judge Layton in *Sincock v. Duffy, supra.*

The Maryland Senate system served as a model in many respects for the Federal Senate. *The Journal of the Constitutional Convention*, G. P. Putnam Sons, 1903, page 202; No. 63, *The Federalist Papers.*

Recognition of Baltimore City in additional Senate representation constituted an exception to the so-called Federal Plan rather than an abandonment of it.

The recognition of the many factors surrounding Baltimore City's unique position in Maryland is a reasonable and rational State policy. Its Senate apportionment was increased because of its size. Bell, *The Legislative Process in Maryland.*

The compromise so evident in the evolution of the Maryland Senate system, which gave representation to the State's varied and diverse interests, reflected the State's collective judgment, from time to time, as to what best served and suited those interests, is rational and should be upheld.

III. *The General Assembly as a whole.*

The alleged malapportionment of the General Assembly "as a whole" is not now before the Court. (See R. 114, 162, 164, 176.)

Representative government, whether upon the State or Federal level, has clearly recognized the lesser unit of government as a basis for political representation.

The so-called "principle of majority rule", as advanced by Appellants, has never been a part of either the Federal or state systems; the foundation stone of democratic government is the protection of minorities from the "tyranny of the majority". See the dissenting opinion of Mr. Justice Frankfurter, in *Baker v. Carr* (369 U.S. at 301); *Nolan v. Rhodes, supra*, 218 F. Supp. at 958.

Baltimore City, together with Baltimore County, or the four populous counties of Baltimore, Anne Arundel, Prince George's and Montgomery together, might, if given the representation urged by Appellants, create a new malapportionment far worse than that here complained of. Can such reorientation assure any "proper diffusion of political initiative"?

If this Court should inquire into the question of whether the Maryland governmental structure as presently constituted actually possesses "responsiveness", it should be noted that the role of a strong Governor, as Maryland has had in recent years, with his base of popular support, tends to offset some discrepancy in Senate representation.

ARGUMENT

I.

MARYLAND SENATE APPORTIONMENT DOES NOT INVIDIOUSLY DISCRIMINATE AGAINST APPELLANTS AND OTHERS SIMILARLY SITUATED.

Unquestionably, the immediate point of beginning of this and other current reapportionment suits in the landmark decision of this Court in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663. There, appellants, qualified voters of the State of Tennessee, sued in the United States District Court for the Middle District of Tennessee, alleging deprivation of federal constitutional rights, in that the state apportionment statute governing members of the General Assembly of Tennessee among the state's 95 counties denied them the "equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes . . .". This Court, speaking through Mr. Justice Brennan (at 369 U.S. 197), stated:

> "In light of the District Court's treatment of the case, we hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes."

Mr. Justice Stewart, concurring (369 U.S. at 265-266), stated:

> "The Court today decides three things and no more: '(a) that the Court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) . . . that the appellants have standing to challenge the Tennessee apportionment statutes'.

"The complaint in this case asserts that Tennessee's system of apportionment is utterly arbitrary — without any possible justification in rationality. The District Court did not reach the merits of that claim, and this Court quite properly expresses no view on the subject. Contrary to the suggestion of my Brother Harlan, the Court does not say or imply that 'state legislatures must be so structured as to reflect with approximate equality the voice of every voter'. Post, p. 332. The Court does not say or imply that there is anything in the Federal Constitution 'to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper and customs of its people'. Post, p. 334. And contrary to the suggestion of my Brother Douglas, the Court most assuredly does not decide the question, 'may a State weight the vote of one county or one district more heavily than it weights the vote in another?'. Ante, p. 244.

"In MacDougall v. Green, 335 U.S. 281, the Court held that the Equal Protection Clause does not 'deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former'. 335 U.S. at 284. In case after case arising under the Equal Protection Clause the Court has said what it said only last Term — that 'the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others'. McGowan v. Maryland, 366 U.S. 420, 425. In case after case arising under that Clause we have also said that 'the burden of establishing the unconstitutionality of a statute rests on him who assails it'. Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 584.

"Today's decision does not turn its back on these settled precedents. I repeat, the Court today decides only: (1) that the District Court possessed jurisdic-

tion of the subject matter; (2) that the complaint presents a justiciable controversy; (3) that the appellants have standing."

Neither *Scholle v. Hare*, 369 U.S. 429, 82 S. Ct. 910, 8 L. Ed. 2d 1, "remanded to the Supreme Court of Michigan for further consideration in the light of *Baker v. Carr* . . ." or *W.M.C.A., Inc., et al. v. Simon, Secretary of State of New York, et al.*, 370 U.S. 190, 919, 82 S. Ct. 1234, 8 L. Ed. 2d 430, remanded on the same basis, can be said to do other than confirm the narrowness of the holding in *Baker v. Carr, supra*, notwithstanding Appellants' protestations to the contrary (Brief, pages 15, 29).

Certainly Mr. Justice Stewart was of the opinion, in staying the order for apportionment in *Scholle*, that ". . . the issues decided by the Michigan Supreme Court are new issues; ones that were not decided in *Baker v. Carr*." See Baltimore Morning Sun, July 28, 1962, page 5; Washington Evening Star, July 28, 1962, page 5 (R. 170). *Baker* neither decided nor indicated what constitutes unconstitutional apportionment. Jerold Israel, *On Charting a Course through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 Mich. L. Rev. 107, 112. Nor does *Baker* answer the question of whether population is the *sole* permissible basis for legislative apportionment under the equal protection clause. Maurice H. Merrill, *Blazes through the Thicket of Reapportionment*, 16 Oklahoma L. Rev. 59, 63. Even Robert B. McKay's *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 Mich. L. Rev. 645, and Jo Desha Lucas' *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 Mich. L. Rev. 711, admit the narrowness of *Baker v. Carr* while asserting, as do Appellants here, that it must have meant much more.

As the Court stated in *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368, 372, 373 (on remand):

> "... we are unable to premise an invalidity of the provisions of the State of New York upon the Baker v. Carr determination by reason of the absence of applicable indicia. ... Counsel for plaintiffs has conceded that 'there is nothing in the explicit opinion of Baker against Carr which would indicate how ultimately the cases were to be resolved on the merits', although counsel contended that there was 'much in Baker against Carr which is implicit' ... This Court is unable to discern this result for which plaintiffs here argue."

See *Clark v. Carter*, 218 F. Supp. 448, 452 (Kentucky Congressional redistricting statute); *Caesar v. Williams*, 84 Ida. 254, 371 P. 2d 241, 244; *Sobel v. Adams*, 208 F. Supp. 316.

Gray v. Sanders, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821, decided on March 18, 1963, cited by Appellants as involving a principle "equally applicable here" (Brief, page 42), struck down the Georgia Unit Vote System as used by that state for counting votes in primary elections for state-wide offices. Mr. Justice Douglas, speaking for the Court, set forth in unmistakably clear language (83 S. Ct. at 807):

> "Nor does the question here have anything to do with the composition of the state or federal legislature. And we intimate no opinion on the constitutional phases of that problem beyond what we said in Baker v. Carr, supra. *The present case is only a voting case.*" (Emphasis supplied.)

Mr. Justice Stewart, whom Mr. Justice Clark joined, concurring, said (83 S. Ct. at 809):

> "This case does not involve the validity of a State's apportionment of geographic constituencies from

> which representatives to the State's legislature assembly are chosen, nor any of the problems under the Equal Protection Clause which such litigation would present. We do not deal here with 'the basic ground rules implementing Baker v. Carr'. This case, on the contrary, involves statewide elections of a United States Senator and of state executive and judicial officers responsible to a statewide constituency. Within a given constituency, there can be room for but a single constitutional rule — one voter, one vote. United States v. Classic, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368."

The county unit system, of course, no longer prevails in Maryland, as of the judgment of the United States District Court for the District of Maryland entered May 10, 1963, in *Maryland Committee for Fair Representation, et al. v. J. Millard Tawes, et al.*, Civil Action No. 14452 (consent decree in which Maryland's Attorney General participated, on behalf of Defendants).

Presumably, for the reverse has nowhere been shown nor has it even been suggested by Appellants, *Gray v. Sanders, supra*, does nothing to overrule or limit the application of *MacDougall v. Green*, 335 U.S. 281, 69 S. Ct. 1, 93 L. Ed. 3, where this Court said:

> "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls.

> not available to the former. The Constitution — a practical instrument of government — makes no such demands on the States." (Quoted from approvingly in Mr. Justice Stewart's concurring opinion in *Baker v. Carr, supra*, 369 U.S. at 265, 266.)

And see *South v. Peters*, 339 U.S. 276, 70 S. Ct. 641, 94 L. Ed. 834, affirming the principle of *MacDougall*, but perhaps in turn silently overruled by *Gray* on other grounds. See Dissenting Opinion of Mr. Justice Harlan in *Gray, v. Sanders, supra* (83 S. Ct. at 809).

While it may be true, as stated by Chief Judge Brune in his dissent to the latest opinion below (R. 173), that *Baker v. Carr* could not well have determined the exact point at which protection against the debasement or dilution of voting rights through state legislative apportionment of representation will be afforded in any specific case; nonetheless, it certainly can be said that an absence to date of any "guidelines for formulating specific, definite, wholly unprecedented remedies" has resulted in a wide divergence of opinion and action among the various state and federal courts and among the judges of those courts, not only as to right but as to remedy. See Mr. Justice Frankfurter's dissenting opinion in *Baker* (369 U.S. at 267). Because of a lack of guiding *judicial* principles upon which to rely, perhaps too many courts may find it considerably more difficult to determine what type of discrimination, in legislative apportionment matters, invidiously violates the commands of the Fourteenth Amendment than to determine what *does not*. Surely any attack such as the present one, striking as it does at the very taproots of the Maryland political and governmental system, ought not to be sustained on such a basis.

The nub of the Court of Appeals' ruling here appealed from (229 Md. 406, 184 A. 2d 715) (R. 162) is that popula-

tion considerations need not be taken into account in determining whether the Maryland Senate apportionment plan invidiously discriminates in violation of the Fourteenth Amendment and that historical precedent furnishes justification and constitutes a rational basis for the present apportionment of the Senate. Appellants' position, earlier, apparently was that the Senate should be based strictly on population. They now seem to have retreated somewhat to a basis "partly on population and partly on area" (R. 122, Brief, page 72). However, population should remain the "strongly dominant factor", in their view (Brief, page 72).

The Maryland ruling finds support in the following cases:

Caesar v. Williams, supra, decided on April 3, 1962, (rehearing denied on May 8, 1962). In that case two Idaho apportionment statutes were attacked by persons claiming that neither provided substantial equal representation for the residents of the more populous counties in the House of Representatives. The trial court upheld the claim of unconstitutionality, but the appellate court reversed and stated as follows (371 P. 2d at 247):

> "It is clear that the constitutional requirement of one representative for each county, superimposed on the population requirement of the statute, will lead to discrepancies between the number of people who will be represented by each individual representative constituting the house of representatives, on a purely numerical basis. Respondent has forcefully pointed out such discrepancies, particularly by the exhibit in his complaint. Clark County, with a 1960 population of 915 persons, and Camas County with a 1960 population of 917, each is entitled to one representative under both the 1951 act and the 1933 act; Elmore County, with a 1960 population of 16,719, and Cassia County, with a 1960 population of 16,121, each

likewise is entitled to only one representative under the 1951 act; whereas under the 1933 act each would be entitled to two representatives. These examples illustrate the extremes of the discrepancies in population representation. But, is such gross disparity so arbitrary and capricious that the 1951 act and the 1941 act must be stricken down as unconstitutional, in favor of the previous 1933 act? Also, is this disparity created by the act itself, or created by the constitution? Another question is whether the disparity is the result of application of a set of facts and circumstances for which the legislation was not designed? Also, in such disparity violative of the equal protection clauses of Idaho's Constitution, Art. I, sec. 2 and of the United States Constitution, Fourteenth Amendment?

"The constitutional limitations of one representative per county and a maximum of not to exceed three times the number of senators immediately destroys any possibility of representation based solely on a per-capita or per-voter basis. Attempting to compare the representation afforded by the constitutional requirement of one representative per county to the representation to be afforded on a per capita basis is impossible. . . .

"The members of the Idaho Constitutional Convention were fully cognizant of the impossibility of mathematical equality in election of representatives by reason of this constitutional requirement of one representative per county. . . ."

This decision is of extreme importance because of the fact that Idaho, like Maryland, constitutionally elects one senator for each county, based upon a geographical distribution of political strength. Article III, Section 2, Idaho Constitution. . .

In *W.M.C.A., Inc. v. Simon, supra,* on remand, the court upheld a New York apportionment plan which, *inter alia,*

allows each county in the state, with one exception, at least one assemblyman in the State Assembly. Depending upon population and on a "ratio" basis, representation is increased. See 208 F. Supp. at 371, 383. The Senate is based substantially on population. Schuyler County, with a population of 15,044, is entitled to one representative, while Suffolk County, with a population of 666,784, is entitled to three, a variation of almost 15 to 1 between them. See 208 F. Supp. at 383, 384. The court held there (208 F. Supp. at 376) that the apportionment provisions were "of historic origin" and "not irrational"; the plan "clearly gives weight to population within the state's counties which forms a basis for the ingredients of area, accessibility and character of interest".

The court further said that the apportionment scheme had "factors adapted to the needs of the State of New York constituted as it is of urban, suburban and rural areas, with congestion of population in one spot, with areas of lesser intensity in other locations and with sparsely settled spaces more remote from the centers of population. All ingredients are present, there is no arbitrariness in formulae or in the result thereof."

In *Sobel v. Adams, supra*, a proposed Florida apportionment plan was approved which resulted in Dade County with 19% of the state population (or 935,047) obtaining but one of 46 state senators. The State House of Representatives is apportioned substantially on a population basis.

The court was of the opinion (at 321) that:

> "It is not required that, in all events, either or both houses of a bicameral legislature must be apportioned upon a population basis of either exact or approximate equality of representation. . . . It is our considered view that the rationality of a legislative ap-

portionment may include a number of factors in addition to population."

In dealing with the House representation question, the court said (at 322, 323):

> "The zeal of the advocates of strict apportionment by a rigid population allocation fails to convince us that the results so achieved would be rational. The plan proposed by the legislature of a representative from each county with additional representatives distributed on a basis of a population ratio seems to us to provide a formula which secures the desirable county representation and a reckoning, to the extent required, of the population factor."

Apropos of the State Senate, the court stated (at 323):

> "Because such a large portion of the legislative function deals with special acts applicable only to a single county or municipality, we think it would be unwise and illogical to provide for more than one Senator from any county, except perhaps from Dade which enacts its own local legislation. Under the plan before us the House of Representatives would be apportioned by a formula in which population is heavily weighted. Because of this we think that population need not be a major factor in the apportionment of the other House. Such apportionment must, however, be made upon a rational basis."

In analyzing the Senate districting scheme in respect of any possible "crazy quilt" attributes, it might possess, the court indicated (at 323, 324):

> "It is possible, but we refrain from saying probable, that some of the county alignments or absence of alignments were the result of the political necessity of concessions in order to procure the passage of the measures we have before us. Disparities and departures from the plan may be pointed out but these are mainly of a de minimis nature and are not

such as, in our judgment, render the plan invidiously discriminatory or rob it of its rationality. . . . What is urban and what is rural, so far as a county is concerned, may depend upon a point of view."

In *Nolan v. Rhodes*, decided June 12, 1963, 218 F. Supp. 953, the court sustained an Ohio constitutional apportionment plan involving the state House of Representatives, established on a basis partly of area and partly on population. The state Senate was not involved.

Commenting upon a system guaranteeing to each county one representative in the House and upholding it against an attack on equal protection grounds, notwithstanding a ratio maximum of almost 15 to 1, the court said (at 957):

"There does not seem to be much reason for a bicameral legislature if both houses are required to be apportioned on the same basis."

Daniel v. Davis, decided June 28, 1963, by a statutory District Court for the Eastern District of Louisiana, upheld a Louisiana apportionment plan for the House of Representatives (which reaches an 8 to 1 disproportion ratio) where each parish in Louisiana, with one exception, received a representative, as does each of the 17 wards in New Orleans. The remaining seats in the House are distributed according to the Method of Equal Proportions.

In *Jackman v. Bodine*, 78 N.J. Super. 414, 188 A. 2d 642, the New Jersey apportionment system, which allows one Senator to each county regardless of its population (resulting in a maximum disproportion ratio of 19 to 1) and allocates House members on a population basis, was sustained, the court saying (188 A. 2d at 650):

"The fact that the present system of representation in our State Senate does not attempt to equalize disproportionate population differences between the vari-

> ous counties . . . is not conclusive on the ultimate question of whether or not the system discriminates invidiously. To be sure, where the make up of one branch of state government completely disregards population as a factor in representation, *some* discrimination *must* result. But it is only when the discrimination is invidious or when the discrimination reflects *no* policy that the State legislative branch must reorganize itself or be reorganized."

In *Jackman*, the plaintiffs had argued as Appellants here have below that the "Fourteenth Amendment *does* require consideration of population differentials *re* senatorial districts. . ." (at 645).

On June 22, 1962, a three-judge Federal District Court reconsidered *Baker v. Carr, supra*, in light of the Supreme Court action remanding the case for further proceedings. See 206 F. Supp. 341. At the time of the reconsideration, Tennessee had recently enacted legislation reapportioning the Tennessee Legislature. The Tennessee Constitution, Article II, Section 6, requires that the ". . . number of senators which, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each . . .". The court found that the apportionment of the house resulted in the termination of the "most glaring inequities", but there still remained some inequities in that the urban voters were still under-represented. The court stated (at 345):

> ". . . One reason for the rule embodies in the Constitution of the state is to afford a measure of protection to governmental units or subdivisions of the state not having a sufficient number of voters to equal the full ratio but yet having a substantial population and possessing significant and substantial interests in state legislative policy. Such a state plan for distribution of legislative strength, at least in one house of

a bicameral legislature, cannot, in our opinion, be characterized as per se irrational or arbitrary. And we think the same conclusion follows if this principle is extended in the same legislative house of a bicameral legislature so as to afford substantial representation to smaller counties by classifying or arranging them in floterial districts. We find no basis for holding that the Fourteenth Amendment precludes a state from enforcing a policy which would give a measure of protection and recognition to its less populous governmental units. . . ."

The court, however, found that the redistricting of the state senate required by the constitutional mandate was "devoid of any standard or rational plan of classification". The court went on to state (at 346):

". . . It creates thirty-three senatorial districts for election of the constitutionally prescribed number of thirty-three senators, making no pretense to equality or substantial equality in numbers of qualified voters. Nor are the districts created by the Act equal or even remotely equal in area. There are also wide variations in the numbers of counties lumped together in the respective districts. The conclusion is irrestible that the apportionment wrought by the 1962 Act with respect to the Senate can only be described, to use the apt phrase of Mr. Justice Clark in his concurring opinion in this case, as a 'crazy quilt'. *It is inexplicable either in terms of geography or demography. Neither can it be explained upon the theory that it seeks to give equal or substantially equal representation to governmental subdivisions or units.* . . ." (Emphasis supplied.)

The court, by its reasoning, clearly laid down the rule that the equal protection of the laws is gratified if at least one house of the Tennessee Legislature is based upon or reasonably related to qualified voters without regard to other factors, when it said (at 349):

> ". . . We find in the context of this case that equal protection requires that such condition be eliminated and that apportionment in at least one house shall be based, fully and in good faith, on numbers of qualified voters without regard to any other factor."

And, in respect of the proposition stated in *Baker v. Carr*, on remand, see *Toombs v. Fortson*, 205 F. Supp. 248, 257, where the court said:

> "Granting the plaintiffs' petition for declaratory judgment, we determine and hold that so long as the Legislature of the State of Georgia does not have at least one house elected by the people of the State apportioned to population, it fails to meet constitutional requirements."

As indicated in our Statement of the Case, (infra, pp. 2-3), not only is the makeup and proper apportionment of the Maryland House of Delegates not in question here nor before this Court, but it has been conceded by Appellants below to be properly apportioned according to population, on the basis of the so-called stopgap legislation of 1962. Thus, if this Court is to hold that at least one house of a state assembly must be elected on a purely population basis, as have *Baker* and *Toombs*, and others, the present apportionment of the Maryland Senate must, we submit, be considered in conjunction with a House of Delegates which, for purposes of this case is properly apportioned according to population.

And apropos of Appellants' position herein, which, despite some considerable backing and filling, must be said to be that the Senate of Maryland should be held to a tight or strict population standard, only *slightly* different from that of the House of Delegates, at the most, and if at all, the court in *Toombs v. Fortson*, said (at 257):

> "It is urged by the plaintiffs here that in its decision in the case of *Scholle v. Hare, supra*, 82 S. Ct. 910, the court in effect decided that constitutional standards required that not only one House but both Houses of a bi-cameral legislature be related to population. . . .
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> "There is some basis for plaintiffs' argument in this direction, especially when we consider that in Mr. Justice Douglas' dissenting opinion in the United States Supreme Court's decision in *MacDougall v. Green*, he and his colleagues, Justices Black and Murphy, seem to have said that the mere fact that the Federal Constitution itself sanctions inequalities because of the structure of the United States Senate, is no justification for a state also to create inequalities by having similar differences. See dissenting opinion, Mr. Justice Douglas, *MacDougall v. Green*, 335 U.S. 281, at page 287, 289. However, that may be, we do not find any authoritative decision by the Supreme Court that causes us to require that in order to give the plaintiff his constitutional rights the state legislature must be constituted of two Houses, both of which are elected according to population."

Scholle v. Hare, 367 Mich. 176, 116 N.W. 2d 350, on remand, decided by a badly split court, struck down a Michigan Senatorial apportionment scheme. As indicated (Appellees' Brief, page 14), Mr. Justice Stewart stayed the judgment on the ground that issues in that case were "ones that were not decided in Baker v. Carr".[14]

In *Sweeney v. Notte*, ... R.I. ....., 183 A. 2d 296, the Rhode Island Supreme Court struck down a state apportionment plan which limited the House of Representatives to 100 but which secured representation to each munic-

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[14] Quite correctly, *Baker v. Carr, Legislative Reapportionment*, at 72 Yale L. J. 968, 1003, footnote 167, concludes that *Scholle* was reached by the Michigan Court, on remand, solely on the basis of State precedent, upon which is superimposed the federal requirement of equal protection of the laws.

ipality, the court holding that such "taken together" results in a denial of equal protection.[15]

In *Moss v. Burkhart*, 207 F. Supp. 885, a three-judge statutory court struck down the Oklahoma apportionment system, which permitted, *inter alia*, a disproportionate ratio of 12 to 1 in the State Senate. The court felt there that a disparity of ten to one in the voting strength between electoral districts made out a *prima facie* case for invidious discrimination and called for strict justification (at 891).[16]

In *Sincock v. Duffy*, 215 F. Supp. 169, a statutory three-judge District Court (by a vote of 2 to 1) struck down a Delaware apportionment system, which, after a 1963 Constitutional amendment, still contained a disproportion of 15 to 1 in respect of the State Senate. The court concluded, *inter alia*, that insofar as the State House of Representatives, which struck a ratio of 12 to 1 was concerned, the

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[15] In *The Significance of Baker v. Carr for Indiana*, at 38 Indiana L. J. 240, comments that the court in *Sweeney*, as in *Scholle* on remand, assume that constitutionality is solely a question of percentages and ratios, rather than a broader question of rationality.

[16] In respect of *Moss*, it is not clear from whence comes the authority to strike such a positive ratio, as, e.g., 10 to 1. And *Moss* further seems to fall into the error of *Scholle* in superimposing a federally protected right upon a state requirement. (See footnotes 14 and 15.) All of this lends credence to the comment in *The Significance of Baker v. Carr for Indiana*, 38 Indiana L. J. 252, 254, that of the courts that have decided apportionment controversies since the historic *Baker v. Carr* decision, only five have determined them according to the traditional standards of the equal protection clause, namely, *Sobel v. Adams, supra; Caesar v. Williams, supra; Maryland Committee for Fair Representation v. Tawes, supra; Baker v. Carr*, on remand, *supra;* and *Lisco v. McNichols*, 206 F. Supp. 471 (striking down Colorado's apportionment system). All others ". . . have gone beyond the traditional standards of the equal protection clause suggested by the *Baker* decision, some in an apparent effort to read into that clause the court's own notion of what is and what is not a democratic system of legislative apportionment. The *Baker* decision does not require courts to choose between competing theories of representation and hold that apportionment systems *need be* based upon the population standard." (Emphasis supplied.)

apportionment basis must be one of population, citing *Gray v. Sanders, supra.* The court further concluded that none of the "area" and other considerations discussed by it should permit any wide deviation from the principle of population representation in the apportionment of the Delaware State Senate. Judge Wright, in concurring, observes that the Senate must be based *substantially* on population. Judge Layton, dissenting on the substantial question of apportionment of the Senate, stated that he could "find nothing constitutionally wrong in the makeup of a State legislature composed of a Lower House whose members are elected upon a strict population basis and an Upper House whose members are elected in equal numbers from each county . . .".

> "Since the so-called federal system has withstood 175 years of stress and strain in the national political arena. I can see no valid reason for interfering with the composition of a State Legislature modeled exactly on it." (at 196, 197)

In *Mann v. Davis*, 213 F. Supp. 577, a split three-judge District Court struck down, *inter alia*, the Virginia Senate apportionment system, which results in a disproportion in ratio of considerably less than Maryland's, the consideration being, it appears, almost solely of population. Judge Hoffman, dissenting (at 586, 591, 592), states:

> "In my judgment the decision of the majority places too much emphasis upon the weighted vote of one county, city, or district as contrasted with the weighted vote in another county, city or district. . . . When we consider other states, such as New York, Maryland and Hawaii, where the concentration of population is in one major city, it may be inappropriate to rely so heavily on population."[17]

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[17] In this connection, *Scholle v. Hare*, on remand; *Mann v. Davis*, together with *Moss v. Burkhart, supra; Sweeney v. Notte, supra;* and *Levitt v. Maynard*, 104 N.H. 243, 182 A. 2d 897, would seem

Apparently, however, Judge Edmund W. Hening, Jr. of the Richmond Circuit Court, in upholding Virginia's legislative redistricting acts by his order of September 24, 1963, differs radically in his conclusions from the majority in *Mann v. Davis, supra*. (See Washington Post and Times Herald, September 25, 1963.)

The consensus of judicial thinking, to date, as illustrated by the foregoing cases would certainly demonstrate, we think, that the rationality of any state apportionment is not determined solely by applying the "one man — one vote", purely populative theory. On the contrary, it recognizes the applicability of other substantial factors which, when applied to the Maryland Senate scheme, supports its constitutionality.

Maryland, appropriately given the cognomen of "America in Miniature", is unusually diverse, geographically and economically. Stretching from the Atlantic Ocean to its western mountains bordering West Virginia, it contains vast climatic differences. The Eastern Shore of Maryland, which is physically set apart from the rest of the State, is economically geared to agriculture, sea-food producing pursuits and to coastal recreation. Its climate is more temperate than the western regions of the State. Southern Maryland's economy is also agricultural with a strong dependence upon tobacco raising. The two principal population centers are found within the central portion of the State. One of these centers, composed of Prince George's and Montgomery Counties, partially circumscribes and is contiguous to the District of Columbia. The portions of these two counties nearest the District are suburban in

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to have departed from traditional equal protection standards by holding that reapportionment systems *must* be based upon population. See *The Significance of Baker v. Carr for Indiana*, 38 Indiana L. J. 240, 250.

nature. The southern portion of Prince George's and the western part of Montgomery are rural. The other population center includes Baltimore City and the surrounding contiguous portions of Baltimore and Anne Arundel Counties.

Whereas Baltimore City is urban in character, its two neighboring counties are not; like Prince George's and Montgomery Counties, they possess both suburban and rural attributes. The economy of mountainous western Maryland is largely devoted to agriculture, mining and timber. Numerous of its sections are sparsely populated.

While Appellants bemoan the ways in which the four most populous counties of the State and Baltimore City allegedly have languished and suffered under malapportionment, common experience points to the contrary. At the outset, even on Appellants' theory, Baltimore City insofar as the State Senate is concerned, is said to be *overrepresented.* (See Appellants' Brief, page 30.) Despite overrepresentation, still, presumably, it suffers. If Baltimore and other large cities suffer from decay, it must be laid to a great many factors other than malapportionment: migration to suburbs of both population and to an extent industry, loss of tax base and source of public finance, etc. Certainly, Baltimore and the populous counties have had no difficulty in obtaining urban renewal authority, although the latter hardly need it (with a few isolated exceptions in certain municipalities in those counties).

It must be said, despite the "cancer" of malapportionment of which the Appellants speak, that Montgomery, Baltimore, Prince George's and Anne Arundel Counties are the most wealthy, prosperous and progressive counties in the State. Partly, this may be laid to home rule, under which Baltimore and Montgomery Counties operate and

which Prince George's and Anne Arundel Counties are currently seeking to achieve. Both Baltimore and Montgomery Counties have wide taxing and other powers, within their express powers. The latter county, within very recent memory, enacted its own public accommodations ordinance and is also included under the Statewide public accommodations act.[18]

Appellants here seem to make much of the rights of *people vis-a-vis people,* but what they argue, in essence, is mathematics, formulae, proportions and figures. As Professor Bickel puts it, in *Reapportionment & Liberal Myths,* Commentary, June, 1963 (pages 490-491):

> "All we have been given are plays on words, plays on statistics, and meaningless figures arbitrarily picked out of thin air.
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> * * * * * *
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> "What does it mean to juggle ratios or to bewail the fact that 20 per cent of a state's population can elect a majority of its legislature, X percent of the population of the United States can elect the President, and X — 10 per cent can elect the Senate? These are not facts; such things never happen."

Appellants complain of gross deprivation while at the same time the counties most said to be suffering under malapportionment of the State Senate have prospered as have no others in the State. They lump together Baltimore City with the populous counties because the figures look

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[18] Indeed, it is the very existence of broad home rule powers made available to the counties under Article XI-A of the Maryland Constitution and implemented by Article 25A of the Annotated Code of Maryland which mitigate whatever disadvantage these counties may incur in the Maryland Senate. Experience has shown that it is the suburban counties that are most likely to avail themselves of the home rule option, as indicated above. Home rule counties need not return to the legislature for many of those legislative authorizations which non home rule counties can obtain only *biennally* at Annapolis.

better; actually, the city and those counties (excepting Baltimore) have little in common. The four counties involved here have both heavily populated and suburban-type areas and sparsely settled agricultural regions. The city dwellers of Baltimore, with their port authority and steel production are confronted with problems of a character completely different from those facing the four suburban counties. These urban problems, which involve large expenditures of funds, concern themselves with adequate standards of health, employment and housing for the city residents, many of whom are of the lower economic and cultural class. The suburban counties, however, are faced with problems of prosperity, which, fortunately, do not involve the same expenditure of public funds. Planning, zoning, water and sewer, subdivision control and adequate park and new school facilities command the attention of the more prosperous suburban dweller. Thus, it may fairly be said that the suburbs are peopled by the "haves" and Baltimore City by the "have nots". Yet all are combined together for purposes of Appellants' comparisons.

If population, in the apportionment of the Maryland State Senate, is to be the sole or "strongly dominant" criterion, as Appellants insist, then it becomes very probable that not only the rural counties of the State, but rural areas of the populous counties, in their turn, will become, in effect, malapportioned, with the specialized interests of those rural areas subordinated to the interests of the more densely industrialized and urbanized areas of those same counties. The State has a legitimate concern in these interests and the State through apportionment should be permitted to strike a balance, we submit, to protect them both. As Professor Bickel further states it, in *Reapportionment & Liberal Myths*, Commentary, June, 1963 (page 486):

> ". . . most, if not all, malapportionments favor rural interests over urban, allocate more strength proportionately to sparsely populated areas than to densely populated ones, and other smaller discriminations within these large ones. This may be undesirable, but who can say it is irrational? Is it more irrational than a farm policy that favors farmers or an anti-trust policy that favors small enterprise?"

And, as stated by James Kilgore Edmundson, Jr., *Legislative Reapportionment, Baker v. Carr*, 65 West Virginia L. Rev. 129, 141, 142:

> ". . . equal representation does not necessarily mean good government. . . . For 'local prejudices' are spawned not only in rural areas . . ."

Jo Desha Lucas, in his *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 Mich. L. Rev. 711, 804, states:

> "It is to be hoped that . . . the advantages of simplicity will not prompt adoption of a standard of mathematical equality based solely upon population, thus ending centuries of experimentation with the design of democratic institutions which will accommodate within the same unit of government a wide variety of interest groups without subjecting all to absolute domination by a close majority which is geographically concentrated and highly organized."

Clearly, interests other than population must be taken into account in the apportionment of the Maryland Senate, where, as in this case, the apportionment of the House of Delegates is not under attack, nor in question, and is, in fact, insofar as the record in this case is concerned, properly and constitutionally, though not perfectly, apportioned.[19]

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[19] One wonders whether population is a proper criterion in any event; should voter registration be considered?

Lisco v. McNichols, supra, recognizes as a relevant factor representation of industrial interests; *Sobel v. Adams, supra,* recognizes representation of general regional interests; *Caesar v. Williams, supra,* recognizes protection of sparsely settled areas; *Levitt v. Maynard,* 104 N.H. 243, 182 A. 2d 897, recognizes as "rational" wealth and the proportion of total taxes paid by a district; *W.M.C.A., Inc. v. Simon, supra,* recognizes a state apportionment plan "of historic origin" as "not irrational", which "clearly gives weight to population within the state's counties and which forms a basis for the ingredient of area, accessibility and character of interest", and Tyler, *Court versus Legislature,* 27 Law and Contemporary Problems, 390, 391, 393, recognizes economic interests.

The court below (R. 167, 168), in upholding the Maryland Senate apportionment plan on historical grounds, quite irrespective of population, did so on the rationale that representation on a county basis, with some modification in respect of Baltimore City, was deeply rooted in Maryland traditions and history, predating, even, the existence of the Federal Union. In fact, the court found that the United States Senate was modeled upon the Maryland plan (See R. 166). See *Journal of the Constitutional Convention,* G. P. Putnam Sons, 1903, page 202.

Starting from Appellants' beginning point, namely, that population must be the sole or dominant criterion in apportionment of the Senate, no other consideration or standard can then be accepted (see Appellants' Brief, page 72). However, Appellees submit that, on the authority cited hereinbefore, under the Maryland plan, history and tradition may be found, by this Court, to be a rational basis for the apportionment now under attack. Jerold Israel, *On Charting a Course through the Mathematical Quagmire: The Future of Baker v. Carr,* 61 Mich. L. Rev. 107, 143, comments that a court:

> "should not, as in the *Scholle* decision (on remand) reject all bases for apportionment schemes other than population as arbitrary and therefore insist upon 'practical equality' of representation. Neither should it, although most lower courts have done so, permit the use of factors other than population only insofar as population is still retained as the predominant factor. Both of these approaches can be justified only on the basis of a fundamental political value in our society which demands total equality of representation, and . . . sustaining the presence of such a fundamental concept necessarily involves the interpretation of the 'republican form of government' guaranteed to the states under Article IV, Section 4."

As the Solicitor General of the United States said, in his address before the Tennessee Bar Association on June 8, 1962 (see Current Constitutional Issues, page 3):

> ". . . History is a powerful influence in constitutional law . . . it would not surprise me greatly if the Supreme Court were ultimately to hold that if seats in one branch of the legislature are apportioned in direct ratio to population, the allocation of seats in the upper branch may recognize historical, political and geographical subdivisions provided that the departure from equal representation in proportion to the population is not too extreme."

The Appellants rely heavily upon political theories and doctrine, which in their opinion make it desirable to have certain reforms effected in the composition of the Maryland General Assembly. However, the issue presented to the court is not whether the people of the State of Maryland have prudently or imprudently adopted provisions in their Constitution, but rather whether these provisions of the Maryland Constitution transcend the limitations prescribed in the Fourteenth Amendment to the Constitution of the United States by denying to the Appellants in their

individual capacities equal protection of the laws. When a state statute or constitutional provision is attacked as being violative of the Equal Protection Clause of the Fourteenth Amendment, the test to be employed has been set down by the United States Supreme Court in *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78, 55 L. Ed. 369, 377, as follows:

> "The rules . . . are these: 1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. . . ."

See also *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U.S. 580, 584, 79 L. Ed. 1070.

Stated more succinctly, the State is to be allowed every reasonable latitude, and the Maryland Constitution will not ". . . be set aside if any state of facts reasonably may be conceived to justify it. . . ." *McGowan v. State of Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393.

It is not inequality alone that calls for a holding of unconstitutionality. Only if the inequality is based on an impermissible standard should the court condemn it. In resolving the issue here presented, the personal choices of

the Appellants or Appellees are not controlling, but, rather, does the choice of the majority of the people of Maryland, as embodied in their Constitution, deny to the Appellants the equal protection of the law.

And, as has been so thoughtfully argued by Appellants in their Jurisdictional Statement filed in this Court in *Roman v. Sincock* (*Sincock v. Duffy* in the United States District Court for Delaware), pages 26, 27, 28:

> ". . . it cannot be supposed for one moment that, if the Reconstruction Congress had ever considered area representation in one house of a state legislature to constitute a denial of the equal protection of the laws, they would ever have readmitted Georgia — much less South Carolina, which had been first to secede and first to fire on the flag.
>
> ". . . So far as we are aware, no court in controversies involving apportionment of a state Senate has troubled to look to contemporaneous Congressional interpretation of the Equal Protection Clause as shown by the readmission of the former Confederate States."

To require that each house of the General Assembly be elected by a system of population proportions, as set forth in the Bill of Complaint, would substantially defeat the reasons for bicameral legislatures, particularly where the terms and qualifications of the members are the same or similar to those of the Maryland General Assembly.[20] It may be significant to note that geographical considerations have been recognized by the people of the State of Maryland in the composition of the judiciary, and that Article IV, Section 14, of the Maryland Constitution, in prescribing the composition of the Maryland Court of Appeals, states that its membership shall be composed of persons residing in certain geographical portions of the State and that the Court's composition is based solely upon these geographical

[20] See Article III, Section 9, Maryland Constitution.

considerations exclusive of the personal qualifications of the individual judges. This is further evidence of the desire of the people of the State of Maryland to have representation, whether in the legislative department or the judicial department, based upon nonpopulation considerations.

In summary, it is respectfully urged that the opinion of the trial court and of the Maryland Court of Appeals below followed the authoritative decisions of this and other courts when they ruled that the Fourteenth Amendment does not *require* that the Senate of Maryland must be elected according to population or apportioned on a basis which is grounded on considerations other than historical precedent and tradition.

II.

THE FEDERAL PLAN ANALOGY IS APPLICABLE TO THE MARYLAND SENATE.

Quite correctly, Appellants contend that the majority of the Court of Appeals below points to the so-called Federal Plan as furnishing analogy and precedent for the composition of the Maryland Senate. Quite incorrectly, we submit, Appellants advert to the evolution of the State Senate of Maryland and not finding what they consider a symmetrical, logically tidy development in that body, especially as Baltimore City is affected, they conclude that there is no valid comparison, that its apportionment scheme lacks rationality and demonstrates an absence of *any* policy of the State. Even if there were a valid comparison, they continue, the disparities present in that body violate Section 1 of the Fourteenth Amendment.

Initially, it must be conceded, we think, that the development of the Federal Union, insofar as representation in the United States Senate is concerned, was hardly on a uniform basis, nor did it represent any discernible policy.

Apart from the original thirteen states and the sovereignty relinquished by them to the Union, can it be said that their sister states (excepting perhaps Texas) thereafter gave up sovereignty to become states? Can it not be said, e.g., that the entry of Alaska and Hawaii (each with two Senators) into the union or the creation of the District of Columbia (with no representation in Congress and a vote, now, only in Presidential elections) do not constitute a distinct and substantial modification of the original so-called Federal Plan?[21] The creation of each state or group of states, as we read history, was done on an arbitrary, compromise basis. Politics, geography, economics and group pressures played their part, pressures by groups not even represented in the state-making process. The exigencies of the situation, not a cohesive, continuous, clearly charted governmental policy, controlled. However, in the American political system, can it be said that such development because it worked toward no clearly defined objective, or represented no application of stated policy, has been "irrational"? And can it be said that a periodic addition to the representation of Baltimore City in the State Senate, on the basis, undoubtedly, of compromise, because of Baltimore's unique position, geographically, as a great port city, industrially and otherwise, represents an "irrational" evolution?

By Appellants' standards, no particular form of representation in the State Senate would qualify (except purely populative) since Baltimore City is not a county. Yet, can the State be said to have acted "irrationally" in desiring, on the one hand, not to have itself dominated by Baltimore City and on the other to have, from time to

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[21] And it may be questionable whether the states forming the Union possessed anything resembling true sovereignty by virtue of their status under the Articles of Confederation. See *Amicus Brief of the Solicitor General*, pages 77, 78.

time, increased the City's representation, so as to strike a balance with the rural areas, especially where the increases were voted by a majority of the citizenry?

Is not the action of the State in regard to its Senate apportionment the "proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses", spoken of in *MacDougall v. Green, supra?*

And can it be said that a plan which allocates to each county a single Senator, on a nonpopulation basis, is an "irrational" policy, where, as has been found by the court below, the counties in Maryland "have always possessed and retained distinct individualities"? (R. 166). See the discussion in *W.M.C.A., Inc. v. Simon, supra*, at 376, where the county is shown to be a more original form of local government than any other, "traced directly to England". And see, in this respect, the opinion of the lower court (R. 165).

In respect of the argument that the states, in relation to the Federal Government, cannot be compared to the county (1) because of the attributes of sovereignty the former possess and (2) because the federal system came together on a basis of compromise among the original states whereas the county exists only at the pleasure of the State, it must again be said that the 37 states admitted to the Union after 1789 were never sovereign bodies and that none of the states now possess many, if any, true attributes of sovereignty. With each passing day, they become, more and more, mere geographical segments of the whole. And apropos of the *compromise* argument, see Professor Israel's *On Charting a Course through The Mathematical Quagmire: The Future of Baker v. Carr*, 61 Mich. L. Rev. 107, 121, 122, 124, where he says:

> ". . . it would be anomalous to hold that the Constitution condemns a state's adoption of a bicameral

legislature with one house apportioned essentially on the basis of population and the other apportioned with reference to the representation of political subdivisions when that same constitution adopted just such a legislative system, with substantial numerical inequality of representation in the Federal Senate, which has been accepted without question since its ratification.

". . . the question has been raised as to how an institutional scheme may be rational if it is the product of compromise between equal forces and arbitrary when it results from a grant made within the discretion of the granting body."

Israel concludes:

"The satisfactory operation of Congress seems to illustrate the general rationality of a system of apportionment which gives some weight (although not necessarily the same as in the federal system) to factors other than population (including, but not limited to, representation of political subdivisions)."

And see Professor Bickel's comment, in *Reapportionment & Liberal Myths*, Commentary, page 487:

"It is very well to maintain that the federal Senate and the federal Electoral College are the product of an historical compromise, which is explained by particular historical circumstances and which is not applicable to the composition of the House of Representatives or of state legislatures. But are we to believe that our federal government lacks a feature that is 'basic to the successful operation of a democracy'? — that, indeed, it contains an inconsistent feature, and is therefore not a successfully operating democracy?"

Appellees question how Appellants on the one hand can point with dismay to malapportionment and plead in this Court for justice, equality and a "one man — one vote" principle in respect of State legislative apportionment, and yet on the other hand approve, and defend, as they do, a

federal Senate system which results in a gross dilution of individual voting power up to a ratio of 75 to 1, over twice the maximum complained of here. Can the Fourteenth Amendment possibly be read in context with the Federal Constitution and Bill of Rights so as to prohibit by the state a discrimination of the type complained of here, and on the other hand permit, *even require*, a discrimination twice as great by the Federal Government in respect of individual voting power where a United States Senator is concerned? Or is the Fifth Amendment applicable to such, under the rationale of *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884.

While this Court will hardly be bound by a ruling of any lower court in these matters, the Federal analogy is not without support, in addition to the ruling of the Maryland Court of Appeals. See *Nolan v. Rhodes, supra*. And see the dissenting opinion of Judge Layton in *Sincock v. Duffy, supra*.

The argument may continue, pro and con, as to what aspects of the Maryland Senate system was admired and emulated by Madison and others of the founding fathers in their deliberations. However, it seems clear that the Maryland Senate system did serve as a model, in many respects, for the Federal Senate. *The Journal of the Constitutional Convention*, G. P. Putnam Sons, 1903, page 202; No. 63, *The Federalist Papers*.

Appellants argue that even if the Federal plan had been adopted in Maryland, it has been abandoned because of the special treatment given Baltimore City. The reason special treatment was given to Baltimore City is clear when it is considered that in 1851 Baltimore City became a separate and distinct political entity. At the time it became an independent government unit, it received the same treatment as the counties, to wit, one senator and membership

in the House of Delegates based upon population. Because of the large number of delegates to be elected from Baltimore City, it appeared that elections-at-large in Baltimore City produced an unwieldly number of candidates, and it was deemed wise and appropriate to divide Baltimore City into legislative districts so that up to the 1851 Constitution the Federal plan was substantially in effect.

The Constitution of 1864 was adopted to weaken the political strength of several Southern Maryland counties which had sympathized with the Confederacy, and had the unfortunate effect of disfranchising substantial numbers of Maryland citizens. As a result of this Constitution, representative government in Maryland came to a standstill, and it did not take long for the Constitution of 1867 to be drafted and subsequently ratified. In 1864 then, for the first time, there was a substantial deviation from the Federal plan, which recognized the domination of Baltimore City in the economic, political and social structure of the State. It is respectfully urged that this recognition of Baltimore City created an exception to the Federal plan rather than an abandonment of the same. It is further urged that there was a sound and rational State policy to support this exception.

The City of Baltimore at that time, and today, houses a vast industrial complex and is the State center of commerce. In addition, it is a major world seaport, which places Baltimore in a special trading position requiring a vast transportation and communications network. Because of these factors, unique interests have congregated in the City of Baltimore and the making of an exception recognizing these factors is a reasonable State policy.[22]

[22] See Final Report of The Commission on More Equitable Representation in The General Assembly of Maryland, Walsh, Chairman, page 9.

Territorial uniformity is not a constitutional requisite. *Salsburg v. Maryland*, 346 U.S. 545, 74 S. Ct. 280, 98 L. Ed. 281; *Ocampo v. United States*, 234 U.S. 91, 34 S. Ct. 712, 58 L. Ed. 1231.

Baltimore achieved a status of a political subdivision, independent of Baltimore County, in 1851. From that time until 1864, it had one Senator. In 1864, in recognition of its emerging status, it was, by the Constitution of that year, given three Senators. In 1867, it received broader powers of local government, retaining its three Senators. In 1900 an additional legislative district was created and again, in 1922, two more districts were created, because of an increase of territory by annexation.

Bell, *The Legislative Process in Maryland*, page 9, states that:

> "Apportionment of the Senate is based on the principle of equal representation of the counties, with some concession to Baltimore City *because of its size.*" (Emphasis supplied.)

Bell makes it clear that it was intended, e. g., under the 1837 amendment to the Maryland Constitution, to limit the representation of Baltimore City. Under the Constitution of 1851, its representation in the General Assembly was again limited. Bell does not conclude, as Appellants argue, that Baltimore City's increase in legislative districts was because of population, although it cannot be denied that its population had increased, in relation to the rest of the State.

Bell concludes (page 20):

> "The Maryland system of legislative apportionment is, as admitted by delegates to the early constitutional conventions, a compromise between the ideas of representation by counties and representation according to population. The principle of county representation is obviously given even greater weight in the Senate

than in the House of Delegates. Any discussion of revising the present distribution of seats must take into consideration several factors; the weight of tradition, the concept of county representation, legislative practices in passing local legislation, the existence in the State of one giant city, and rival theories of representation. It is no easy task to devise a system to satisfy all needs, and in practice they must be balanced by compromise."

The compromise evident in the apportionment of Baltimore City, in relation to the State Senate, is, we submit, a basis sufficient to support its rationality under the Fourteenth Amendment. The assignment of Senators to Baltimore City took place gradually, from 1776 to 1922, approved on each occasion of change by the people on constitutional referendum. To conclude, as apparently Appellants have, that because the adding of Senators and legislative districts took place in some general relation to an increase in population in Baltimore City, this population growth triggered, directly, such increase, is to ignore the other factors present in the Maryland system. In the *Report of Committee on More Equitable Representation in the General Assembly of Maryland*, February 14, 1947, the committee noted that "Maryland, while small, has a great diversity of interests scattered among the counties, such as coal, lumber, orchards, tobacco, truck farming, sea food, industry and port facilities. This fact, the committee observed, makes it essential to continue the present plan of having every county and Baltimore City represented in the legislature . . .".

It was to assure this continued diversity of interests as well as to protect the counties and Baltimore City, as it were, from each other, that the present Senate apportionment evolved to its present form. The State, in the only fashion in which such things happen under our system, haltingly, yet according to State constitutional norms and

forms of law, made its collective judgment from time to time that this evolution best served its varied interests. It cannot be said, we submit, that such an evolution *now* must be deemed not rational because it lacked the type of clearly defined goals or objectives these Appellants believe the system at every stage should have shown or because its long-range aspirations have lacked periodic restatement. Constitutional change comes slowly and is fashioned in the crucible of compromise. Even this Court, in *Baker v. Carr, supra*, has not prophesied where we go from here in reapportionment matters.

III.

THE GENERAL ASSEMBLY AS A WHOLE

As pointed out by Appellees hereinbefore (pp. 2, 3), consideration of alleged invidious discrimination or malapportionment of the General Assembly *as a whole* is not before this Court. For purposes of this case and for all other purposes, the Maryland House of Delegates is now properly apportioned by virtue of the 1962 "stopgap" legislation. Chapter 1 of the Special Session of 1962. Appellants, in pressing this point by a series of irrelevant and in fact misleading arguments, have failed to demonstrate how this Court can reach a question not only not decided below, in either the Maryland Court of Appeals or in the trial court, but a question which, in another form, was expressly conceded by them (R. 114).[23]

Appellants ingratiatingly point to a recent passage by the Senate of three proposals for amending the Constitution of the United States, all originating with the Council

[23] This legislation has been attacked as being unconstitutional and a Bill for Declaratory Decree to have the reapportionment legislation declared null and void was dismissed on September 24, 1962. (Allen, et al. v. Simpkins, et al., Circuit Court for Calvert County, Equity No. 2097.)

of State Governments, one of which would have limited the authority of this Court in respect of certain matters (Appellants' Brief, pages 63, 64). The lack of relevance to this case of the above observation by Appellants requires little answer. They then point to a failure by the Senate to approve, in 1963, certain legislation passed by the House as an indication of the general recalcitrance by the upper body of the Maryland General Assembly to participate, responsibly, in the legislative process. This is hardly the forum in which to argue the worth of particular legislation, especially the items selected by Appellants as being representative of the popular will, but suffice it to say there were substantial numbers who at the time regarded the examples cited as lacking in merit.

Appellants vow their commitment to the principle of bicameralism, insisting at the same time that it is the *existence* of the two houses, rather than the difference in the bases of those houses, that is, the essential aspect of the State two-house legislative system. Ever since the earliest times in our American Colonies local subdivisions such as towns or counties, rather than approximately equal population units, were the dominant unit of government. The Colonial Assembly and its successor, the State Legislature, were composed of representatives from these units of government.[24] In fact, the Constitution of Maryland of 1776 accepted this theory of governmental structure when it allotted to each county four members in the House of Delegates, regardless of size, population or any other factor, and also allotted two delegates to Annapolis and Baltimore Town.[25]

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[24] See discussion by Mr. Justice Frankfurter in his dissenting opinion in Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, 738.

[25] Ibid. Footnote No. 5.

Representative government, whether upon the state or Federal level, has clearly recognized the lesser unit of government as a basis for political representation.

Notwithstanding the foregoing, at least since the adoption of the Constitution of the United States in 1789, the states have relinquished their "sovereignty" in the traditional sense of the word.[26] No state may enter into a treaty with a foreign nation, exchange diplomatic representatives, secede, declare war, alter its boundary or even enter into a compact with a sister state without the consent of Congress. There is no question that the states retain certain elements of sovereignty, but these elements are becoming increasingly more limited.

In reviewing the Maryland Constitution, it has been observed:[27]

> "In general, it may be observed that the discussion of the day indicates clearly that the most serious problem which confronted the framers of our Federal and State Constitutions was that of securing a practical system of checks and balances to prevent the disproportionate increase of power on the part of any one arm of the government. They sought the golden mean between the possibility of lodging oppressive power in the hands of the few or permitting the masses to run wild in excesses of sudden emotion or passion. On one hand, whilst overthrowing an established 'nobility', they feared the creation of a new autocracy of wealth and position; on the other, they dreaded an irresponsible 'mobility', as mass control was then termed. . . ."

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[26] "Sovereign", according to Webster's New International Dictionary, 2nd Edition, is defined:

> "Independent of, and unlimited by, any other; possessing, or entitled to, original and independent authority or jurisdiction; as a *sovereign* state (that is one exercising the usual powers of self-government and of declaring peace and war without outside control); *sovereign discretion*."

[27] The Federalist, edited by J. E. Cooke, Wesleyan University Press (1961), page 430

Likewise, many sister states have deemed it advisable to grant unto counties (or towns) equal representation of governmental units in at least one house of the legislature. See Book of the States, 1962-63, Council of State Governments, pages 58-62.

Appellants state that "For better or for worse, the people of the United States and, if given the chance once again, the people of Maryland, follow the principle of majority rule" (Brief, page 68). As pointed out earlier, in the Federal Congress, majority rule is not the *general* rule; rather majority rule is substantially compromised, e.g., in the United States Senate and in the District of Columbia provision. Nor can it be said that the people of Maryland have subscribed to the type of "majority rule" Appellants advance. On the contrary, under the first constitution of Maryland, in 1776 (Article XV), Appellants' principle of majority rule was not established, and in the subsequent constitutional ratifications, in 1837, 1851, 1864, 1867, 1900 and 1922, the people of Maryland voted in favor of the very thing Appellants insist the people of Maryland are not in favor of. The principle of pure "majority rule", as defined by Appellants, has never been a part of either the Federal or state systems; to hold so is to misapply experience and to misread history. In fact, the foundation stone of democratic government is the protection of the minorities from the "Tyranny of the majority." See *Nolan v. Rhodes*, 218 F. Supp. at 958. Illustrative of this is the great volume of litigation entertained by this Court in the areas of civil liberties, freedom of speech and of religion. As stated by Mr. Justice Frankfurter, in his dissenting opinion to *Baker v. Carr* (369 U.S. 301):

> "The notion that representation proportioned to the geographic spread of population is so universally accepted as a necessary element of equality between man and man that it must be taken to be the standard of

> a political equality preserved by the Fourteenth Amendment — that it is, in appellant's words 'the basic principle of representative government' — is, to put it bluntly, not true. However desirable and however desired by some among the great political thinkers and framers of our government, it has never been generally practiced, today or in the past. It was not the English system, it was not the colonial system, it was not the system chosen for the national government by the Constitution, it was not the system exclusively or even predominantly practiced by the states at the time of adoption of the Fourteenth Amendment, it is not predominantly practiced by the states today."

Appendix A to the Dissenting Opinion of Chief Judge Brune, in the Maryland Court of Appeals (R. 184, 185, 186, 187) shows that Baltimore County, with 492,428 inhabitants, and Baltimore City, with 939,024, on a 1960 basis, totaling 1,431,452, slightly under half the population of the State, if given Senators on the basis suggested by Appellants, could between them *now* virtually control the Senate. Considering their connections and community of interests, might it not be said that this combine could assert itself against all opposition, to the detriment of the rest of the State, in any given legislative situation? Obviously, carrying "one man — one vote" to its illogical, and unworkable conclusion in this case, pure equality of representation would result in a situation (based upon any reasonable projection of Baltimore County's exploding population) where Baltimore City and County combined would be able to control, and if they chose, run roughshod over the rest of the State.[28] Appellants, by manipulation

[28] Similarly, based upon any reasonable projection of population trends, the four suburban counties, if given the senatorial representation based on population which Appellants seek, could control the Senate to the detriment not only of the rural counties but of Baltimore City as well. Such a coalition could represent a real threat to Baltimore City since it is entirely possible that these four prosperous

of figures, have, in respect of the above observation, we think, become their captive. Can they argue that control by Baltimore City and County of the State Senate will assure a "proper diffusion of political initiative"? Appellees submit that the relief which Appellants demand here will result in a far worse malapportionment than is now complained of, in the words of Mr. Justice Frankfurter, 369 U.S. at 270, "disappointing to the hope".

If this Court should inquire into the question of whether the Maryland governmental structure as presently constituted actually possesses the "responsiveness" spoken of in *Baker v. Carr* and *Legislative Apportionment: A Problem of Standards*, 72 Yale L. J. 968, et seq., it should be noted that, the fact of a strong Governor, able to steer his program through the Assembly, notably where the Governor and the majority party are of the same political complexion, would tend to offset some discrepancy in Senate representation in favor of certain areas, by virtue of the Governor's ability to veto bills and by thus doing coerce legislators to support his program.

Maryland has traditionally had strong executive leadership. Maryland's Governors, now elected at large, are therefore bound to be responsive to all segments of the population of the State. The State has traditionally possessed a strong two-party system; with strong factions within each party; thus, gubernatorial candidates have been exposed to vigorous statewide primary and general elections. Both campaigns give him contact with the various diverse elements within the State. In addition, of the last six Governors (spanning the period from 1920 to the present)

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counties could combine to protect their accumulated wealth to the sacrifice of the welfare needs of the economically less fortunate people of Baltimore City.

four had previously held statewide offices.[29] Nor have Maryland's Governors been unresponsive to the urban or suburban interests of the State, four of the six having been residents of Baltimore City and one of those having served as Mayor of Baltimore City. Illustrative of the control which Maryland's Governors have exercised in the General Assembly was the success of Governor Tawes in obtaining the favorable passage of five of the six items of his 1963 legislative program.[30] One of these items, the abolition of slot machines in four southern Maryland counties, could hardly be regarded as a catering to the rural interests. See Chapter 617, Laws of Maryland, 1963.

In any event, whatever avenues of inquiry may be explored by this Court in determining whether invidious discrimination prevails in the State Senate of Maryland, the form of apportionment, here in question, we submit represents rational, though not perfect, State policy. We believe sufficient bases have been demonstrated herein on which it should be sustained.

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[29] Governors Ritchie (1920-1934), O'Conor (1939-1946) and Lane (1947-1951) served as Attorneys General prior to their governorship and Tawes (1959 to present) as Comptroller.

[30] Baltimore Morning Sun, January 3, 1963.

CONCLUSION

For the reasons herein stated, Appellees respectfully request this Court to uphold the judgment of the Court of Appeals of Maryland.

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